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IN THE

Supreme Court of the United States

No. [redacted] 10

ISAAC J. COLLINS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

No. [redacted] 11

T. C. FULTON, W. V. FISHER AND J. D. DILWORTH.

Appellants.

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Western Division

REPLY BRIEF OF APPELLANTS ISAAC J. COLLINS, T. C. FULTON, W. V. FISHER AND J. D. DILWORTH

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Of Counsel.

Toledo, Ohio, November 13, 1943.

IN THE

Supreme Court of the United States

No. 15

ISAAC J. COLLINS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

No. 16

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Appellants.

vs.

THE UNITED STATES OF AMERICA,

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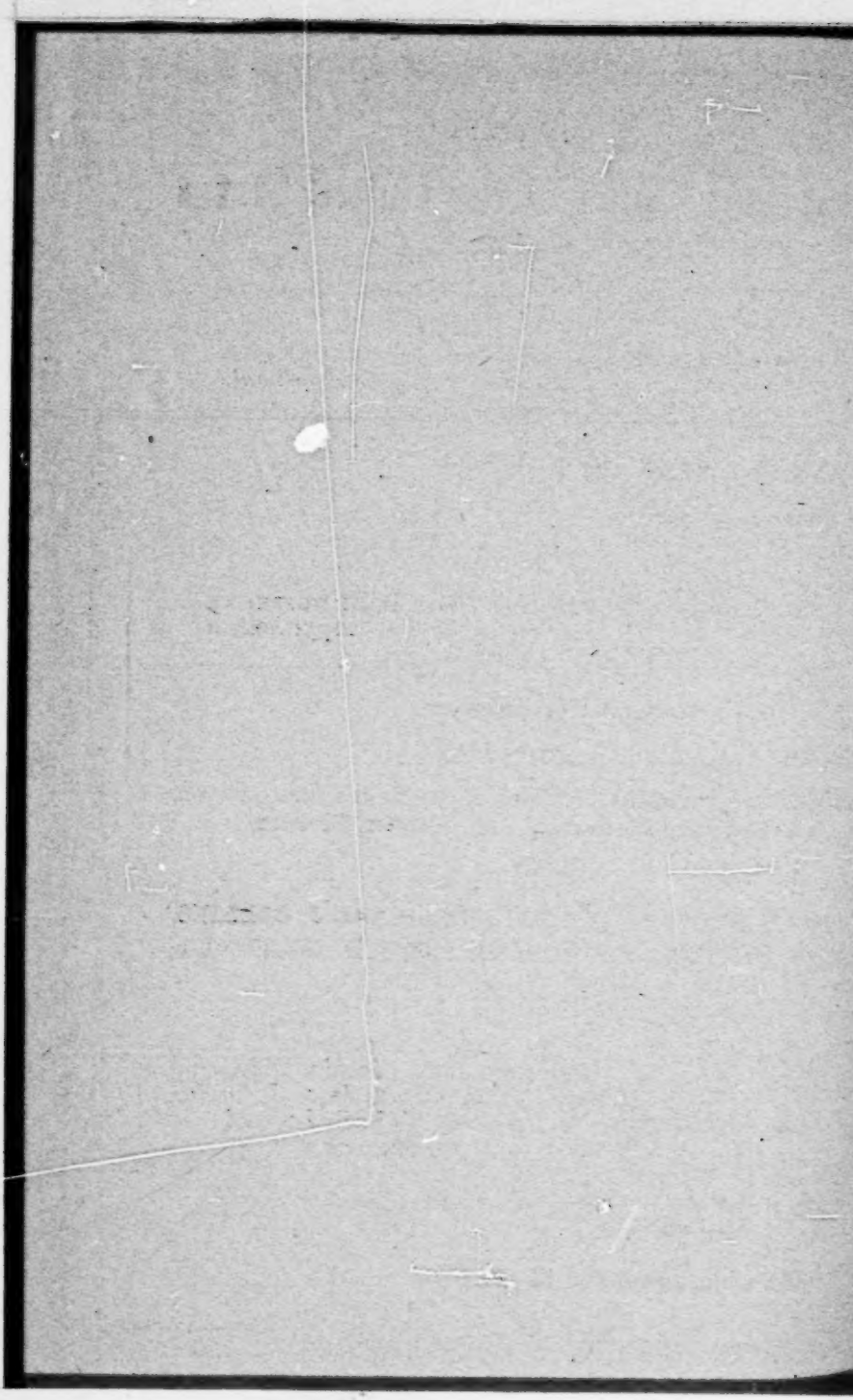

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REPLY BRIEF OF APPELLANTS ISAAC J. COLLINS, T. C. FULTON, W. V. FISHER AND J. D. DILWORTH[1]

[1]Notwithstanding the many varied and dissimilar issues presented by various of the ten appeals arising out of the proceedings below, the Government has chosen to file a single brief for all appeals. With notable brevity (fourteen pages) it has lumped together under a single head its entire "Statement of the Case" and "Argument" as to the issues presented by both of these appeals. We make reply accordingly in a single brief. Equally notable is the tacit admission of the Government implicit in its failure to controvert the basic premise set forth in our main briefs that the findings of fact entered by the court below are insufficient to support a conclusion that any of these appellants were members of or participants in the adjudicated conspiracy and monopoly.

THE GOVERNMENT'S POSITION BELOW AND ITS PRESENT POSITION AS TO THE BASIS UPON WHICH THE ASSERTED CONNECTION AND PARTICIPATION OF THESE APPELLANTS IN THE ADJUDICATED CONSPIRACIES, ETC., RESTS

In our main briefs heretofore filed in behalf of the appellants in each of these appeals, we have pointed out that aside from certain procedural questions there discussed, the crux of both appeals is whether there is any tenable basis upon which can be properly rested the conclusion that these appellants were participants in, connected with, and responsible for the adjudicated conspiracies, monopolies and combinations.[2]

In the court below the Government expressly rested the asserted connection and liability of all the individual defendants for violation of the anti-trust laws upon Section 14 of the Clayton Act[3] claiming as to these appellants that such asserted connection and liability thereunder stemmed from their activities as officers or directors of the dismissed Anchor Hocking Glass Corporation,[4] from the fact that they were each small stockholders of Hartford[5] (although Section 14 of the Clayton Act makes no reference to stockholders) and as to Appellant Collins from the fact that he was formerly a director of Hartford[6] (although

[2]As in our main brief, in the interest of brevity, throughout this brief we include "conspiracy, combination and monopoly" in the term "conspiracy, etc."

[3]Title 15 U.S.C.A., Sec. 24, Printed in full in Appendix. Pages 98-100 of Govt. "Brief in Opposition to Motion of Anchor Hocking Glass Corporation and Associated Defendants to Dismiss the Complaint"; pages 424-5 of Govt. main brief in court below.

[4]Par. 25 of complaint, R. 9; page 2 of Govt. "Brief in Opposition to Motion of Anchor Hocking Glass Corporation and Associated Defendants to Dismiss the Complaint"; page 425, Note 364C, Govt. main brief in court below; pages 192-4 of Govt. reply brief in court below.

[5]Pages 193-4, 197 of Govt. reply brief in court below.

[6]Pages 193, 195 of Govt. reply brief in court below.

neither the findings nor the evidence show a single instance in which he "authorized, ordered or did" any act adjudged to have constituted a violation of the anti-trust laws by Hartford).

The judgment and the findings of fact and conclusions of law as to each of these appellants were apparently entered upon the basis of the Government's contention of derivative liability,[7] although as pointed out in our main brief it is difficult, if not impossible, to determine upon just which of the foregoing theories the liability was held to have been derived as to Appellants Fulton, Fisher and Dilworth. As to Appellant Collins, it seems entirely clear that he was retained as a party defendant upon the erroneous assumption[8] that he was an "individual defendant(s) associated with Hartford- Empire Company" and through that company had become connected with and participated in the asserted conspiracy, etc.[7]

Every pertinent finding of fact of the court below and the evidence with reference thereto and every pertinent conclusion of law was considered and discussed in our main briefs, from which we believe it incontrovertibly appears that said findings, evidence and conclusions of law furnish no supportable basis for holding that any of these appellants ever became members of or in any wise participated in such adjudicated conspiracies, etc., either through any of the corporate defendants, or in their individual capacities, or on any other theory.

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[7]See FF 15, R. 7280; FF 23, R. 7282; FF 210, R. 7323; FF 618, 619, 622, 623, R. 7399; FF 628, R. 7400; CL 86, R. 7419; CL 89, R. 7420; Par. 3 Final Judgment, R. 7657; oral opinion of court below, R. 6854.

[8]As pointed out in Collins' main brief (pages 4-6) there is not a single allegation in the entire complaint charging Collins to have been connected with or to have participated in the asserted conspiracies, etc., through Hartford and neither the record proof (Br. pages 19-26) nor the findings of fact (Br. pages 27-41) show any such connection or participation.

It seems unnecessary to here rediscuss our position in that regard. However, in its brief the Government, impliedly conceding the soundness of our position, apparently now abandons the position it took in its pleadings and briefs in the lower court pursuant to which the judgment was entered as to these appellants, *viz., derivative* liability under Section 14 of the *Clayton Act* through connection with a defendant corporation. Instead it now asserts that these appellants were parties to and participants in the adjudicated conspiracies, etc., in their individual or personal capacities[9] and thus are *directly* liable under the *Sherman Act*. Finding no support for such claim in the findings of

[9]At page 306 of its brief, the Govt. suggests that an individual may violate the Sherman Act in his individual capacity quite apart from any connection with a corporation. This may be true, but if so, the Govt. can take no comfort in it, for the reason that as shown by the undisputed proof pointed out *post*, aside from individual purchases of a small interest in Hartford stock and a minority interest in Monongah stock, neither of which transactions *was* found by the court below to be in any wise in furtherance of the adjudicated conspiracy or otherwise unlawful, none of the acts of the appellants were in their personal capacities "apart from the corporation." On the contrary, all of such acts were as officers or directors of a corporation, none of them were found by the court below to have been violative of the law or in furtherance of the asserted conspiracy either as acts of the individuals or of the corporations involved, and the record proof will not support any such inferential construction. The cases of *U. S. vs. McAndrews & Forbes Co., et al*, 149 Fed. 823 (N. Y., 1906) and *Tribolet vs. U. S.*, 11 Arizona 436 (1908) (Govt. Br., 305) merely hold that a corporation may through its officers and directors be doing one or a number of perfectly lawful and proper things at one time, and that said officers or directors in their personal capacity may at the same or a different time be doing other utterly different things violative of the law, quite separate and apart from their activities in behalf of the corporation, in which case obviously the individuals would be guilty of violation of the law in their personal capacities, whereas the corporation would not be tarred by their acts. On the other hand, if both sets of acts were unlawful, then of course both would be guilty of a violation. Here, however, unlike the cited cases, the acts relied upon were done exclusively as officers or directors of a corporation and none *have* been adjudged violative of the anti-trust laws, either as to the individuals or the corporations involved.

fact or conclusions of law of the court below or the evidence in connection therewith for this belated shift of position, the Government brief largely ignores these as a basis of any claimed connection or participation of appellants. Instead, it recites in its "Statement of the Case"[10] (Br. 173-80) a list of business activities of Appellant Collins over a period of some forty years, for the most part not in his personal capacity,[9] but as an officer or director of various corporations, which with the exception of the defendant Hartford were predecessors or subsidiaries[11] of the dismissed Anchor Hocking, and with some of which companies other of these appellants were associated. To these activities the Government seeks to impart a sinister character by treating them as if the mere recitation of them is enough to show that they constituted a chain of interconnected action, all taken in pursuance of a continuing and all-pervading unlawful intent and purpose to suppress competition and stabilize prices, whereas in fact the transactions were, as shown by the record, largely unrelated to each other, had no reference by way of purpose, intent or result to the elimination of competition, or any attempt to control prices, nor any connection with the adjudicated conspiracy, etc., and merely represented an effort by said companies as circumstances from time to time permitted to increase the competitive production and distribution of glassware without too great restriction under the patent licenses and the machinery leases under which they were compelled to operate, and which patents and machinery were owned and controlled by others.

Counsel for the Government sought to have these claimed inferences as to asserted unlawful intent, purpose

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[10]As if its claim would be bolstered merely by repetitive statement, this same list of activities is again recited under "Argument" (Br. 303-306).

[11]Monongah Glass Co., Turner Glass Co., General Glass Co., Hocking Glass Co., Salem Glass Works.

and result of these transactions drawn by the court below, except that there such claims were largely directed at the corporations involved, and through them at Anchor Hocking and its associated defendant officers and directors, including appellants. As will be pointed out in detail *post*, the court below held that such inferences were not established by the evidence and not only did *not* find that any of said activities were in furtherance of the asserted conspiracy, etc., or otherwise violative of the anti-trust laws, *but actually held to the contrary by flatly declining to enter findings of fact to that effect as proposed by the Government.* The burden in the court below was upon the Government in this regard, and consequently this court will presume from the refusal of the court below to find in accordance with the Government's requests, that the evidence does not establish that such transactions were in furtherance of the asserted conspiracy, etc., or otherwise unlawful in purpose, intent or result as claimed by the Government[12] and in fact such refusal by the court below is tantamount to a finding to the contrary. Under Rule 52a[13] and the established practice long prevailing in equity, this court will not disturb this holding by the lower court unless clearly erroneous, giving due regard to the opportunity of the trial court to judge of the credibility of the witnesses.[14] This is particularly true where, as here, the trial court refused to draw inferences from evidence which is not only equally susceptible to the inferences which he drew contrary to those asserted by the Government, but which asserted inferences are in fact repelled by the record

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[12]*Clark vs. Frederick*, 105 U. S. 4, 5 (1881); *U. S. vs. Rhodes*, 49 Fed. 2d 228, 229 (C. C. A. 4, 1931).

[13]Federal Rules of Civil Procedure.

[14]*Adamson vs. Gilliland*, 242 U. S. 350, 353 (1916); *Davis vs. Schwartz*, 155 U. S. 631, 636 (1894); *Stonega Coal & Coke Co. vs. Price*, 106 Fed. 2d 411, 417 (C. C. A. 4, 1939), cert. denied 308 U. S. 618.

proof. In such circumstances, this court will not draw an inference contrary to that drawn by the court below.[15]

Upon the inferences contained in such *rejected* findings, the Government here mainly rests its claim of connection and participation by these appellants.

This effort to thus bolster up the wholly insufficient findings of fact as a basis for supporting the judgment against these appellants by resurrecting a rejected claim of inferential violation of the anti-trust laws through acts and transactions not only *not* found by the court below to have been in furtherance of the adjudicated conspiracies, etc., or otherwise violative of the law, but in fact rejected as such by said court, brings into bold relief the complete lack of any supportable basis for the holding that any of these appellants were in any wise connected with or participants in the adjudicated conspiracy, etc.

We shall consider seriatim the transactions referred to in the Government's brief, briefly pointing out in each case the evidence which repels the asserted inference of unlawful intent, purpose and result, and which clearly demonstrate the correctness of the trial court in rejecting the same.

THE ACTS OR TRANSACTIONS CLAIMED BY THE GOVERNMENT TO HAVE BEEN IN FURTHERANCE OF THE ASSERTED CONSPIRACY, CONTRARY TO THE HOLDING OF THE COURT BELOW

The Government first points out (Br. 172, 302) that all of these appellants were not only officers or directors of Anchor Hocking, but that they are also stockholders of Hartford and that Appellant Collins was formerly a Hart-

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[15] *Pennsylvania R. Co. vs. Chamberlain*, 288 U. S. 333, 339 *et seq.*

ford director. But no connection with or participation in the adjudicated conspiracy, etc., resulted from this.[1]

In this connection, the *sole* basis upon which any of these appellants were charged in the complaint (Par. 25, R. 9) to have participated in or otherwise become connected with the asserted conspiracy, etc., was through participation in the management and direction of the dismissed Anchor Hocking. The Government (Br. 302) seeks escape from the implications stemming from this square-toed position so taken below by the ingenious, albeit wholly fallacious rationalization that since paragraph 34 of the complaint contains a blunderbuss charge that "The defendants have violated * * * the Sherman Act" that this negates the specific averments of paragraph 25 of the complaint as to the manner in which appellants are claimed to have so violated said act, and constitutes a charge of participation otherwise than through Anchor Hocking. A cursory examination of paragraph 34 will disclose that there is there set forth merely a general description of the character of the "Offenses Charged," and that it in no wise purports to set forth either the capacity in which the individuals were made defendants nor the means or manner in which they are claimed to have committed or become liable for the offenses so described in said paragraph 34, nor the basis upon which their connection or participation therein is rested. Those claims are all set forth as to *all* individual defendants in paragraphs 17 to 26 (R. 7-9) of the complaint, paragraph 25 (R. 9) of which relates to these appellants. That *all* the individual defendants, including these appellants, are charged in the complaint with connection and participation in the asserted conspiracy, etc., solely through participation in the management of the respective corporate defendants of which they are respectively officers, directors, or

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[1]Points 1 and 2 Collins' main brief, pages 14-44; Point 1 Fulton, *et al.*, main brief, pages 13-23; *supra*, pages 2, 3.

agents, and that violation by them of the anti-trust laws is therefore charged to be a derivative liability under Section 14 of the Clayton Act, necessarily required to be imputed through an adjudged violation of the anti-trust laws by one of the corporate defendants, cannot be denied in the face of the foregoing allegations of the complaint. Conclusions of Law 86 and 89[2] make it clear that the Final Judgment was entered upon this theory as to *all* individual defendants.

The Government next refers to certain testimony of Appellant Collins[3] in which as a glass manufacturer he expressed a perfectly natural legal and proper desire for stable prices in the glass industry in the sense of prices which were not wildly fluctuating from one extreme to the other, or "not all over the lot" as he put it, so that the companies in which he was interested could sell their product at a reasonable profit above cost. He was speaking *not* of rigged or controlled prices, but of the desirability of a stable economic condition in the industry price-wise, upon which he could count and plan with respect to and which would avoid the economic disturbance and waste which inevitably follows in the wake of instability in any industry. It was in this perfectly legal and proper sense[4] that he spoke of stability and stabilized prices. This generalization the Government lifts (Br. 174, 303) from the text of his testimony, and contrary to his uncontradicted testimony[5] that there was never anything in the industry such as price stabilization in the sense of a price structure by domination or agreement, attributes to it by inference an approval of and desire for controlled or dominated or rigged prices.

This asserted inference the court below held was *not*

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[2]R. 7419-20.
[3]R. 2915.
[4]*Maple Flooring Association vs. U. S.*, 268 U. S. 563, 582.

established by the evidence by rejecting the Government's proposed findings of fact to that effect.[5]

Having thus wrongly construed an expression of a perfectly legal and proper interest in price stability into an approval of price rigging, the Government uses such assumed construction as a springboard to next charge (Br. 303-4) that Appellant Collins, with the assistance of Appellant Fulton, and sometimes of Appellant Fisher, sought "through mergers, the elimination of competition," and the stabilization (that is, domination and control) of prices. The Government below sought to have the trial court draw exactly this same wholly unfounded inference as to the object and purpose of the undesignated mergers to which it refers in its brief (see Gov. proposed findings of fact 535,[6] 542[7], 550[8], 667[9], 669[10] and 671[11]), all of which the court below flatly rejected. Morever, the only so-called merger in which any of the appellants participated was between Anchor Hocking and Hocking Glass Company, which in connection with the dismissal of Anchor Hocking the court below expressly found[12] "was not a combination of competing industries as such," in terms holding the same to have been lawful and proper and in no wise in contravention of the anti-trust laws.

Next, in the face of the refusal of the court below so to do, the Government seeks (Br. 174) to fasten an inference of improper intent and purpose upon a perfectly law-

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[5]Govt. Proposed Findings of Fact 535 (R. 7040), 542 (R. 7041), 550 (R. 7043), 667 (R. 7067), 669 (R. 7067-8), 671 (R. 7068).

[6]R. 7040.

[7]R. 7041.

[8]R. 7043.

[9]R. 7067.

[10]R. 7067-8.

[11]R. 7068.

[12]See opinion of the court on motion of Anchor Hocking and related defendants for dismissal (R. 6844).

ful transaction of Hocking Glass Company (a predecessor of the dismissed Anchor Hocking) based upon a statement by Smith, the President of Hartford, contained in a letter[13] to a non-defendant from which it appears that Smith thought that Collins (President of Hocking) thought that Hocking had an exclusive license[14] on "lantern globes," whereas Smith thought "technically" it didn't. On the basis of this letter, it is claimed, contrary to the refusal of the trial court so to find, that Hocking had an exclusive Hartford license to manufacture lantern globes. This alleged exclusive license the Government couples (Br. 174) with a claim that Hocking through Collins objected to a grant by Hartford to Macbeth-Evans of a license for hot mold tumblers as evidence of cooperation with Hartford to obtain for Hocking a preferential position under the Hartford system in the industry (Br. 304). The court below was requested to attach this precise inference to this transaction by a finding of fact proposed by the Government (526, R. 7038). The trial court held that the same was *not* established by the evidence by declining so to find. As shown by the evidence,[15] the real fact was that Hocking Glass Company and Federal Glass Company were the inventors of hot mold tumblers, having developed them at tremendous expense in their own plants. Being dependent upon Hartford as the owner of the machinery upon which the same were manufactured and of the patents thereon, they requested from Hartford an exclusive right as to hot mold tumblers and asked that the right be denied to Macbeth-Evans until they had received back their development

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[13]Ex. 126, R. 879, 12640.

[14]Aside from the letter referred to, there is no evidence whatever in the record that Hocking actually had an exclusive license even on the lantern globe business, which is practically extinct. The court below rejected the Govt. Proposed Findings of Fact (526, R. 7038) to that effect.

[15]R. 2942-3.

expense. This request Hartford denied and Macbeth-Evans was granted a license. Thus not only did the court below refuse to impute an improper purpose or result to this transaction, but any such inference is flatly repelled by the evidence.[16]

The next transaction referred to (Gov. Br. 175-7, 304-5) involve the Monongah and Turner Glass Companies, which became insolvent in 1930 and 1931 and were reorganized through the General Glass Company. Both of these companies were Hartford licensees, and although not defendants in the case, and although the Monongah Company was not so much as mentioned in the entire bill of complaint, the Government below claimed that the activities of these companies were connected with and in furtherance of the asserted conspiracy, etc. The court below held that this was not established by the evidence, not only by declining to enter findings of fact to that effect proposed by the Government, but also in declining to enter any findings whatever which so much as even mention any transactions involving either of said companies.

Prior to 1926 Appellant Collins had from time to time acquired a small amount of stock in Monongah Glass Company.[17] In 1926, Hayden, Miller & Co., Investment Bankers of Cleveland, Ohio, formed a group which acquired a minority interest in the common stock of Monongah. Appellant Collins was a member of this group.[17] In 1927, this minority stock interest was exchanged for a minority stock in-

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[16]Contrary to the Government's claim (Footnote 65, Br. 175), these transactions in no wise negative, but on the contrary emphasize Appellant Collins' consistent controversy and disagreement with the Hartford licensing policy. As he testified, "I always felt we had too many restrictions in our licenses and we should be able to make anything that we wanted to make on our feeders regardless of what it was." R. 3002. See Collins' main brief pages 25-26 for resume of evidence of Collins' consistent opposition to Hartford licensing policy.

[17]R. 2899.

terest in Turner Glass Company. Turner acquired the remaining common stock of Monongah, and Monongah became a subsidiary of Turner.[18]

In 1928 Monongah was in failing circumstances and foreclosure upon its plants was imminent. It owned some 15,000 shares of Hartford stock, which was pledged under its mortgage. Collins, Fulton and Fisher purchased in the aggregate approximately 5,000 shares of this stock to cure the existing default under the mortgage and to keep it in operation as a going concern. The sale was approved by the Monongah stockholders and directors and by the holders of 92% of the Monongah bonds, which bonds were in default, and for the security of which said stock was pledged.[19] There were no other purchasers for said stock at that price at the time.[20] The proceeds which Monongah received from the sale of the Hartford stock were used to pay off one-half of its outstanding bonds and to pay other company debts, and for working capital[21] and Monongah was thereby enabled to continue until late in 1931 as a going concern. None of these appellants purchased another share of Hartford stock.[22]

The Government claims (Br. 175, 304) that the purpose and intent of these various transactions was "principally because they desired broader license rights under the Hartford system" for the companies in which they were interested. The court below held to the contrary, and expressly declined to draw this inference as to purpose (see Gov. Proposed Findings of Fact 527-531, R. 7038-9), and the undis-

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[18]The Govt. (Br. 175) erroneously claims that Collins, Fulton and others (instead of Turner) "in 1926 purchased practically all the common stock of Monongah."

[19]Ex. AH 5306 (R. 3929, 14984); Ex. AH 5314 (R. 3932, 14999); Ex. AH 5315 (R. 3932, 15002).

[20]R. 3014.

[21]R. 3014-15; Ex. AH 5314 (R. 3932, 14999); Ex. 5315 (R. 3932, 15002).

[22]R. 3014.

puted evidence incontrovertibly establishes that the court was entirely correct.

Caught in the backwash of the 1929 economic collapse, Turner became insolvent and with its consent a receiver was appointed in 1930.[23] Its subsidiary, Monongah, likewise failed in 1931.[24] The owners of Hocking were stockholders and creditors of Turner.[25] Thatcher Manufacturing Company owned all of Turner's second preferred stock.[26] Turner owned Monongah. Hocking, Thatcher and representatives of the holders of the outstanding Turner bonds ($850,000) entered into an agreement for the reorganization of Turner and Monongah through the organization of General Glass Company, conditioned upon Hartford agreeing that it would not repossess the Turner and Monon-

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[23]The Govt. lifts a sentence from the testimony of Hartley, President of Turner, with respect to an entirely different transaction in no sense involving this receivership, and says:

> "*Because* Hartley, President of Turner, refused to put Turner through the wringer voluntarily, Hartford (Collins being one of its directors) put Turner in receivership." (Italics ours.)

There is not the slightest record support for the statement that it was "because" Hartley refused to bring about a voluntary receivership that Hartford brought the receivership action. This claim rests on the unsupported assertion of counsel for the Govt. The undisputed evidence shows that Turner's inventories and accounts receivable had been pledged, its plants were mortgaged, its working capital had been wiped out, and that it admitted insolvency in the receivership action (R. 3015-16). Hartford was a large creditor of Turner and was entitled to and did move to protect its lawful rights in the receivership proceedings (R. 3015). The court below refused to find as requested by the Govt. (R. 533, 703) that Hartford "forced Turner into receivership" or that the receivership proceedings were in any way in pursuance of the asserted conspiracy.

[24]Notwithstanding an operating deficit of over $600,000, preferred dividend arrearage of over $350,000, a defaulted bond issue of $405,000, unsecured indebtedness of over $200,000 and a loss from operations for the first 36 weeks of 1931 of $68,494.41 (Ex. 1780, R. 4144, 14281) the Government says (Br. 177) Monongah was "once more on the upgrade."

[25]R. 3015.

[26]$500,000, R. 3015.

gah machinery and equipment and would grant to the new corporation licenses of the same scope as those held by Turner and Monongah.[27] Hartford agreed to this request and General Glass was organized with a working capital of $500,000 and bid in the Turner assets at receiver's public sale, subject to the outstanding Turner bonds, which sale was approved by the court (R. 3017). At the request of the Monongah bondholders, General Glass purchased certain of Monongah's unmortgaged assets, and agreed to a six months' trial period of operation of the Monongah plant under lease.[28] For the year during which Monongah was operated, General sustained an operating loss of approximately $70,000,[29] due to insufficient volume to operate both the Monongah and Turner plants. It therefore returned the Monongah plant to the bondholders and transferred the Monongah business to the plant at Winchester, Indiana, which it had purchased from the receiver.

To this reorganization of the insolvent Monongah and Turner Glass Companies through the organization of General Glass (of which Appellants Collins, Fulton and Fisher were officers or directors) and the acquisition by General of the assets of the two insolvent companies, the Government attributes an inferentially unlawful purpose and intent to eliminate competition (Br. 177, 304) and otherwise to further the asserted conspiracy, etc. Actually, as shown by the record proof, the intent, purpose and result of this transaction was to convert two insolvent, non-operating companies into a solvent, going concern, thereby reviving

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[27]R. 3016-17.

[28]Ex. AH 5121 (R. 9570-1); R. 4147.

[29]Ex. 1572, R. 3941, 8040. The Govt. (Br. 177) claims that the plant showed an operating profit, but as shown by the evidence cited (R. 4255), this was a gross operating profit "before the payment of taxes, interest on the Monongah bonds, insurance and expenses of maintenance and repair upon the Monongah plant and equipment and before deduction of depreciation on such plant and equipment."

a competitive business which but for such reorganization would have undoubtedly perished. Thus the inference asserted by the Government is flatly repelled by the proof, and the court properly rejected the Government's proposed findings of fact to the contrary (Gov. proposed findings 527 to 541, inclusive[30]) and declined to find or adjudge a single transaction in which Monongah, Turner or General participated to have been in any wise violative of the anti-trust laws.[31]

The sole remaining transactions to which the Government asks that this court impute an inference of unlawful intent and purpose, notwithstanding the refusal of the lower court so to do, involve two transactions of General Glass Corporation, one with Hartford, the other with a non-defendant,[32] the record proof with respect to each of which is as follows:

General inherited the license rights of the insolvent Turner and Monongah Companies at the time of the reorganization of those companies in 1931 (R. 1455). This included a right to use Hartford machinery in the manufacture of fruit jars for domestic use.[33] This was a valuable right, although neither Turner nor Monongah had ever manufactured fruit jars for domestic use, nor did General after the acquisition of the same, and it had no plans to

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[30]R. 7038-41.

[31]Compare the rejection by the court below of all the Government's proposed findings of fact as to the claimed illegality of intent, purpose and result of the transactions of Monongah, Turner and General Glass, and the refusal to hold or adjudge any of said transactions to be in furtherance of the conspiracy, or otherwise violative of the anti-trust laws, with the patently unfounded claim of the Government in Footnote 64, page 303 of its brief that by holding Appellants Collins, Fulton and Fisher in the case "the court at least by implication ruled that their individual activities" in connection with the above companies "were illegal."

[32]Nivison-Weiskopf Co.

[33]R. 1455.

enter that field,[34] the fruit jar business being of a highly specialized character, requiring a particular type of business organization (R. 1455). In that situation, Hartford asked General if it would sell the right, and at what price, and after some negotiations between the two companies, a price of $100,000 was agreed upon on March 23, 1933.[35] Here, again, contrary to the contention now made by the Government, the court in no wise adjudged this transaction to be in furtherance of the adjudicated conspiracy, etc., or otherwise violative of the anti-trust laws, and hence such transaction by no possibility can furnish any basis for holding any of these appellants to have thus become connected with the asserted conspiracy, etc.

The final transaction referred to in the Government's brief relates to the litigation between General Glass Company and Hartford over the Nivison-Weiskopf feeder (Br. 178-9, 305). Notwithstanding the failure of the court below to adjudge this to have been in any wise unlawful or in furtherance of the asserted conspiracy, etc., this is characterized by the Government as "an outstanding example of Collins' cooperation with Hartford."

Here are the record facts:

In 1931 representatives of the Nivison-Weiskopf Company[36] and General Glass Company entered into negotiations looking to the possible purchase of the Nivison glass manufacturing assets and business by General (R. 2933). Prior to that time Hartford had obtained a decree in the United States District Court holding that feeders employed by Nivison infringed Hartford's patents in certain

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[34]R. 3023.

[35]R. 2978; Ex. 198, R. 998, 8876.

[36]This company was principally engaged in the manufacture of corrugated paper boxes, but it also had a small glass container manufacturing business (R. 3021), which part of the business was being operated at a loss (Ex. 287, R. 1126, 9006).

respects,[37] from which decree both Hartford and Nivison appealed, which appeal was pending throughout the negotiations aforesaid. Nivison insisted that as a part of the sale to General, General indemnify it against "any judgment for either profits, damages or costs arising out of or incident to" the pending patent litigation with Hartford.[38] In these circumstances, General took up with Hartford the matter of how much Hartford might be willing to accept by way of damages in case Nivison lost the appeal.[39] Hartford offered to settle for $50,000, *which had no reference to the purchase of the Nivison equipment or patents.*[40] General did not accept the offer, and the offer was withdrawn[41] because General decided to await the outcome of the Nivison appeal as well as the outcome of the then pending Hazel-Atlas appeal in the Third Circuit Court before making any agreement of any kind with Hartford, since in the event of a decision adverse to Hartford in either of such cases, General might be free to use the Nivison feeders without being faced with a suit for infringement by Hartford.[42] Consequently, General concluded its purchase from Nivison and conducted the pending Nivison appeal through to a conclusion at a cost to it of over $5,000.[43] Thereafter, the Court of Appeals for the Third

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[37]58 Fed. 2d 701, 703.

[38]Ex. 287, R. 1126, 9006.

[39]R. 2935. The Government quotes (Br. 178) a Hartford Memorandum of the reasons why *it* was willing to settle by accepting $50,000 in damages, and without the slightest basis therefor by implication attempts to attribute these same reasons to General. As a matter of fact, General eventually forced Hartford to pay it $20,000. (Ex. 288, R. 1128, 9013).

[40]Ex. AH 5122, R. 3021, 14825. The Government cites no record reference for its statement to the contrary (Br. 177), which is untrue.

[41]Ex. AH 5123, R. 3022, 14826.

[42]Ex. 1142, R. 2937, 13768A; Ex. AH 5124-28, incl., R. 3022, 14828-32.

[43]R. 3023.

Circuit held the Hartford patents valid and infringed by the Hazel-Atlas equipment[44] and the Circuit Court of Appeals for the Sixth Circuit held the Hartford patents there involved valid and infringed by the Nivision equipment.[45] thus rendering General liable in damages for the Nivison infringement. General thereupon revived its former settlement negotiations with Hartford, transferring to Hartford the adjudicated infringing Nivison equipment and patents thereon for $20,000 and a release of all claims for infringement damages by Nivison.[46]

Here, again, the Government asks this court to impute to General and, through General, to the appellants as its officers and directors, an intent and purpose to further the adjudged conspiracy through this transaction. Such inference is wholly inconsistent with the record proof, and the court below properly refused to so find or adjudge.[47]

We have thus analyzed each act or transaction referred to in the Government's brief upon the basis of which they seek to erect the inferences, contrary in each case to the holding of the court below, that the transactions were in furtherance of the adjudicated conspiracy, etc., and were participated in by these appellants in their individual capacities. The court below having declined to draw any such inference, this court will not now do so.[48] Moreover, as pointed out, the asserted inferences are flatly repelled by

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[44]59 Fed. 2d 399.

[45]58 Fed. 2d 701.

[46]Ex. 288, R. 1128, 9013.

[47]FF 620, R. 7399. See Collins' main brief pages 38-9. In this connection the Government (Br. 180, Note 68) characterizes our statement (Collins Br. 12) that Collins "is only claimed to have participated in one transaction *found below to have been illegal*, and that in May of 1932," as erroneous (see FF. 310, R. 7323) citing FF. 620 (R. 7399). Reference to finding 620 and the conclusions of law will disclose that neither the transaction referred to in that nor any other finding, save finding 210, was adjudged by the court below to have been illegal.

[48]*Supra.*

the evidence, and the transactions involve almost exclusively acts by the appellants, not in their individual capacity, but as officers or directors of corporations, and there being no adjudicated violation of the anti-trust laws either by the individuals or by such corporations, there is no basis upon which to predicate any violation by any of these appellants.

OTHER GOVERNMENT CONTENTIONS

As pointed out in our main briefs[1], the complete lack of any findings or evidence in any wise connecting any of these appellants with the adjudicated conspiracy, etc., and the utter weakness of the Government's entire case in this regard, is further demonstrated by two procedural errors of the court below, which furnish additional compelling reasons why these appellants should now be dismissed.

First, the complaint[2] charged that Anchor Hocking and its associated individual defendant officers and directors (including appellants) joined the asserted conspiracy, etc., through the purchase in 1937 of the assets of the Hocking Glass Company. This was the sole connective transaction set forth in the complaint. The court below ruled that this transaction was in no wise in furtherance of or connected with the adjudicated conspiracy, etc., and was perfectly lawful and proper (R. 6844). Nevertheless, said court admitted and considered for connective purposes, over timely and appropriate objection, evidence as to certain other transactions of appellants not referred to in the complaint, as officers and directors of companies other than Anchor Hocking (particularly Hartford as to Appellant Collins), which transactions occurred as much as fifteen

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[1]Collins brief pages 16-19; Fulton, *et al* brief, Footnote 10, pages 17-18.

[2]Par. 169, R. 49.

years prior to 1937, the date in which said appellants were asserted in the complaint to have joined the asserted conspiracy, etc., through Anchor Hocking. This was manifest error, for the reasons pointed out in our main briefs.[3] In essence, the Government's only answer (Br. 306) is that this constitutes a "variance," which is a "technical" objection unavailable unless a party has been misled, surprised or otherwise prejudiced, and not here available because of appellants' "failure to object on this ground at the time the evidence was introduced" (Br. 307), citing Rule 15 (b) of the Federal Rules of Civil Procedure as to amendment by implication where issues not raised by the pleadings are tried by express or implied consent!

The suggestion that these appellants impliedly consented to the variances by *"failure to object" to such evidence at the time is contrary to fact and flatly refuted by* the record (R. 643-5, 658, 1084, 2896, 2911, 2918, 2975, 2978, 3025-6, 4141-42).

The claim (Br. 308) that Rule 15(b) provides for "amendments to conform the pleadings to the evidence in such instances" is equally misleading. The phrase "such instances" clearly refers to instances where issues "are tried by express or implied consent of the parties," and hence has no application here. Moreover, Rule 15(b) contemplates not only the actual amendment of the pleadings where, as here, objection to the evidence was made, but further provides "the court may grant a continuance to enable the objecting party to meet such evidence." As pointed out in our former brief,[3] if this court were now to treat the case as though the Government, in pursuance of leave from the court below, had amended its complaint and had thereby put appellants upon notice of the necessity of meeting its amended claims, such action, in view of the fact

[3]Collins brief, pages 17-19; Fulton, et al. brief, Footnote 10, pages 17-18.

that no such steps were actually taken, would operate to deny any day in court to these appellants on these new issues.

The prejudice inhering in the error is fully set forth in our main briefs.[3]

In this connection, the Government refers (Br. 305, Footnote 66) to the admission in evidence of Ex. 2005 (R. 6746, 14633) after "it had rested its case in chief and after these appellants had finally rested, moved for dismissal and retired from any further participation in the case" (Collins' Assignment of Error III, R. 7908). As pointed out in the main brief of Appellant Collins (pages 32-34), the statement of the Government (Br. 178-9) that Exhibit 2005 shows that Appellant Collins "participated in a discussion by Hartford directors of plans to induce Hazel to join the conspiracy" is patently incorrect as a mere reading of the exhibit will disclose. However, if, as claimed by the Government, any significance is to be given to this exhibit as against appellants, it was plainly erroneous to have received it in evidence at the time and under the circumstances stated. The cases cited by the Government merely show that the court after notice to these appellants might have granted a request by the Government to reopen its case against them for reception of such evidence as to them. No such request was made or granted, and no such notice was given.

Second, as to the lack of jurisdiction of the court below under Rules 6, 58, 59, and 79 of the Federal Rules of Civil Procedure, to entertain or grant the Government's motion for rehearing of appellants' motion (no. 16) for dismissal and to reverse its previous order granting said motion, which motion for rehearing was filed some 2½ months after the entry of the order granting said motion to dismiss, the Government refers to Rules 6 and 59(b), *but completely ignores Rules 58 and 79(a).*

The Government erroneously states (Br. 309) that the court below merely "orally" granted the motion for dismissal on February 27, 1942, and that the clerk merely "made a notation to that effect on the docket."

Rule 59(b) grants the right to file a motion for rehearing "not later than 10 days after the entry of the judgment." Rule 58 (which is not so much as mentioned by the Government) in so far as pertinent provides:

> "* * * When the court directs the entry of a judgment * * * that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; * * *. *The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment;* and the judgment is not effective before such entry." (Italics ours.)

On February 27, 1942, upon the granting of the motion of Appellants Fulton, et al, for dismissal, the clerk below made a proper notation in the civil docket in accordance with the above quoted portion of Rule 58 and Rule 79 (a) and duly served a copy of the order upon the appellants and the Government on the same day, which copy bore the notation:

> "In conformity with Rule 77(d) of the Federal Rules of Civil Procedure, please take notice that *the following order or judgment* was entered on February 27, 1942. C. B. Watkins, Clerk, United States District Court, Northern District of Ohio." (Italics ours.)

Thus, contrary to the Government's contention,[4] there

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[4]In support of its contention that no judgment or order had been entered under the Rules, the Government cites (Br. 310) *U. S. vs. Colangelo*, 27 Fed. Supp. 921 (E. D., N. Y.), and *U. S. vs. 3376.1 Acres of Land*, 27 Fed. Supp. 1023 (E. D., Ky.). Neither case is in point. In the first case, although the trial court had rendered an opinion, no notation had been made in the civil docket in accordance with Rules 58 and 79(a) and before the entry of such notation or the filing of any judgment or order, a motion to reopen the case for the receipt of further evidence was granted. As a matter

was a judgment or order entered on February 27, 1942, in accordance with and as provided for by Rules 58 and 79(a), and consequently the court below was without jurisdiction to entertain the Government's motion for rehearing of said appellants' motion under the provisions of Rules 59(b) and 6(b).

But the Government contends (Br. 310-11), contrary to the plain language of Rules 59(b) and 6(b) and the decision in *Safeway Stores, Inc., vs. Coe,* 136 Fed. 2d 771 (App. D. C.), that motions for rehearing are not covered by the time limit fixed in said rules.

We quote (so far as pertinent) the plain, unambiguous provisions of Rules 59 and 6(b):

Rule 59(a):

> "* * * A new trial may be granted to all or any of the parties and on all or part of the issues * * * (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. * * *
>
> "(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence."

Rule 6(b):

> "Enlargement. * * * the court * * * may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c)[5] thereof, or the period for taking an appeal as provided by law."

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of fact, for aught that appears in the opinion, this motion was made within the ten-day period as provided by Rule 59(b). In the second case, the trial court had not even rendered a decision, let alone entered an order or judgment in accordance with Rules 58 and 79(a).

[5]This relates exclusively to the time for serving affidavits.

The cases cited by the Government in support of its contention are not in point.

Neither *Bowman vs. Loperena*, 311 U. S. 262 (1940), nor *Pfister vs. Northern Illinois Finance Corp. et al.*, 317 U. S. 144 (1942), involve a construction of any rule here relied upon. Both of those cases involve proceedings in bankruptcy to which the Federal Rules of Civil Procedure are by Rule 81 in terms made inapplicable. As pointed out in the *Pfister* case, Section 39(c) of the Bankruptcy Act expressly empowers the court to enlarge the prescribed time within which a petition for review may be filed for good cause shown. There is no such jurisdictional grant contained in the Federal Rules of Civil Procedure as to motions for hearing under Rule 59, except on the ground of newly discovered evidence. In fact, Rule 6(b) in terms forbids any such enlargement.

Seymour vs. Hawkins, 5 F. R. Serv. 692 (D. C., 1941), cited by the Government (Br. 310) involved a motion for rehearing filed *within* the 10-day period prescribed by Rule 59 and an affidavit filed two months later. The court struck the affidavit as being filed out of rule, and denied the motion. Similarly in *Suggs vs. Mut. Ben. Health & Acc. Assn.*, 115 Fed. 2d 80 (C. C. A. 10), (Br. 311) the motion was filed *within* the 10-day period and hence no question was presented as to the jurisdiction of the court to entertain the same. *Bateman vs. Donovan*, 131 Fed. 2d 759 (C. C. A. 9), (Br. 311) neither cites nor discusses the Federal Rules of Civil Procedure and involved merely the right of a court to vacate an order granting a new trial. *Pittsburgh vs. American Foundry E. Co.*, 41 Fed. Supp 841, (Br. 310) merely deals with the rehearing of an interlocutory order at a time when the case was admittedly pending as to all parties. The Federal Rules of Civil Procedure are neither considered nor discussed.

A construction of Rules 59(b) and 6(b) so as to permit

a court to entertain a motion for rehearing not filed within the time limit there prescribed would be in derogation of the express language of the rules and render the same meaningless. The Government's contention that the court below had jurisdiction to entertain its motion for rehearing and to reverse the court's previous judgment granting appellants' (Cause No. 16) motion for dismissal entered at the conclusion of the entire case some 2½ months before the filing of said motion aptly reflects the wholly synthetic character of the entire claim that any of these appellants have had any connection with or participated in the adjudicated conspiracy, etc.

CONCLUSION

We respectfully submit that each of the appellants in Appeals 15 and 16 must be dismissed.

Respectfully submitted,

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Toledo, Ohio, November 13, 1943.

APPENDIX

15 U. S. C. A., Sec. 24:

"Whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court. Oct. 15, 1914, c. 323, §14, 38 Stat. 736."